2.0 LEGAL REVIEW

2.1 Introduction

Since the United States Supreme Court's decision in *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989), governmental entities have struggled to establish and maintain affirmative action programs to eliminate discriminatory practices, while complying with the guidelines issued by the Supreme Court. The *Croson* decision and lower court cases that followed have set forth the legal standards that should be the basis for a well-designed disparity study. This review identifies and analyzes those standards, and it summarizes how courts evaluate the constitutionality of race- and gender-specific programs. Finally, this review discusses the application of the legal principles enunciated in those decisions to methodologies used in this disparity study.

2.2 City of Richmond v. J.A. Croson Company

In 1983, the Richmond City Council adopted a Minority Business Utilization Plan (the Plan) following a public hearing in which seven citizens testified about historical *societal* discrimination. In adopting the Plan, the Council also relied on a study which indicated that "while the general population of Richmond was 50 percent African American, only 0.67 percent of the city's prime construction contracts had been awarded to minority businesses in the five-year period from 1978 to 1983."[1] The evidence before the Council established that a variety of state and local contractor associations had little or no minority business membership. The Council also relied on statements by a Council member whose opinion was that "the general conduct of the construction industry in this area, the state, and around the nation, is one in which race discrimination and exclusion on the basis of race is

[1] *City of Richmond v. J.A. Croson Co*., 488 U.S. 469, 479-80 (1989).

widespread."[2] There was, however, no direct evidence of race discrimination *on the part of the city* in its contracting activities or evidence that the city's prime contractors had discriminated against minority-owned subcontractors.[3]

The Plan required the city's prime contractors to subcontract at least 30 percent of the dollar amount of each contract to one or more MBEs. The Plan did not establish any geographic limits for eligibility. Therefore, an otherwise qualified MBE from *anywhere* in the United States could benefit from the 30 percent set-aside.

J.A. Croson Company, a non-M/WBE mechanical plumbing and heating contractor, filed a lawsuit against the City of Richmond alleging that the Plan was unconstitutional and violative of the Equal Protection Clause of the Fourteenth Amendment. After the district court and Fourth Circuit Court of Appeals upheld the Plan, the Supreme Court vacated the appellate decision, and remanded the case for further consideration in light of *Wygant v. Jackson Board of Education*.[4]

On remand, a divided appellate court refused to uphold the Richmond Plan. The court held that "findings of societal discrimination will not suffice [to support a race-based plan]; the findings must concern prior discrimination by the governmental unit involved."[5] The court further held that the Plan was not narrowly tailored to accomplish a remedial purpose. The 30 percent set-aside requirement of the Plan was held to be arbitrarily chosen and not sufficiently related to the number of minority subcontractors in Richmond or any other relevant number.[6] As a result, the appellate court struck down the Richmond Plan and the Supreme Court affirmed this decision.

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[2] *Id*. at 480.
[3] *Id*.
[4] *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986).
[5] *Croson*, 488 U.S. at 485.
[6] *Id*. at 486.

2.3 Standards of Review for Race-Specific and Gender-Specific Programs

In *Croson*, the Supreme Court determined that strict scrutiny is the appropriate standard of judicial review for race-conscious affirmative action programs such as the Minority-Owned Business Enterprise (MBE) Program in the City of Phoenix--which utilizes goals and price preferences in City contracting and purchasing. The Court concluded that a race-conscious program must be based on a compelling governmental interest; there must be a strong evidentiary basis which identifies and proves the discrimination; and the program must be narrowly tailored to achieve its objective.

Regarding the affirmative action plan in *Croson*, the Supreme Court stated:

> Since the plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely on their race, *Wygant*'s strict scrutiny standard of review must be applied which requires a firm evidentiary basis for concluding that the under-representation of minorities is a product of past discrimination.[7]

Strict scrutiny is the most stringent form of constitutional review, and for an MBE program to pass constitutional muster under this standard the program must be (1) based on a compelling government interest, and (2) narrowly tailored to achieve its objective.

Concerning gender-specific programs, such as the Women-Owned Business Enterprise (WBE) Program in the City of Phoenix, the Supreme Court has never directly addressed the issue of a gender-based classification in the context of WBE programs. *Croson* was limited to the review of an MBE plan. In other contexts, however, the Supreme Court has ruled that gender classifications are subject to *intermediate* scrutiny instead of the more rigorous strict scrutiny standard applied to racial classifications. Intermediate scrutiny requires the governmental entity to demonstrate an important governmental objective and means that bear a direct and substantial relationship to achieving that objective.[8]

[7] *Croson*, 488 U.S. at 472.
[8] *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

The Ninth Circuit has specifically applied intermediate scrutiny to WBE programs.[9] In *Coral Construction Company v. King County*, the court noted that some degree of discrimination must be demonstrated in a particular industry before a gender-specific remedy may be instituted in that industry: "[T]he mere recitation of a benign, compensatory purpose will not automatically shield a gender-specific program from constitutional scrutiny."[10] The Ninth Circuit did make one distinction between the factual predicate necessary in an MBE disparity analysis and the factual predicate necessary in a WBE analysis. Specifically, intermediate scrutiny does not require a showing of governmental involvement, active or passive, in the discrimination it seeks to remedy.[11] This showing is required under the strict scrutiny standard of review applied to race-conscious programs.

A. To Withstand Strict Scrutiny an MBE Program Must be Based on a Compelling Governmental Interest such as Remedying Discrimination.

Under strict scrutiny, a race-conscious affirmative action program must be based on a "compelling governmental interest" and must be "narrowly tailored" to achieve that interest. In *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, the court stated:

> In practice, the interest that is alleged in support of racial preferences is almost always the same--remedying past or present discrimination. That interest is widely accepted as compelling. . . . [T]he true test of an affirmative action program is usually not the nature of the government's interest, but rather the adequacy of the evidence of discrimination offered to show that interest.[12]

The Ninth Circuit in *Coral Construction*, identified two factors necessary to establish a compelling governmental interest. Interpreting *Croson*, the court stated that in order to

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[9] *Coral Construction Co. v. King County*, 941 F.2d 910, 931 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 875 (1992); *Associated General Contractors of California, Inc. v. City and County of San Francisco*, 813 F.2d 922, 939 (9th Cir. 1987).

[10] *Coral Construction Co.*, 941 F.2d at 932.

[11] *Id*.

[12] *Engineering Contractors Ass'n of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 906 (11th Cir. 1997) (citing *Ensley Branch NAACP v. Seibels*, 31 F.3d 1548, 1564 (11th Cir. 1994) (citations and internal quotation marks omitted)).

maintain a valid set-aside program a showing must be made that "identifiable discrimination has occurred within the local industry affected by the program."[13] Essentially, "a governmental actor cannot render race as a proxy for a particular condition merely by declaring that the condition exists."[14] The second factor necessary to show a compelling governmental interest is "the governmental actor enacting the set-aside program must have somehow perpetuated the discrimination to be remedied by the program."[15]

A state or local government cannot employ a race-specific program on the basis of an amorphous claim of *societal* discrimination, simple legislative assurances of good intentions, or on congressional findings of discrimination in the national construction industry. The state or local government may only employ a race-specific remedial plan if it identifies past or present discrimination with the degree of particularity required by the Fourteenth Amendment.

1. A Strong Evidentiary Basis Must Exist That Specifically Identifies and Demonstrates the Discrimination to be Remedied by the M/WBE Program.

While the Supreme Court did not specifically define the methodology that should be used to establish the evidentiary basis required by strict scrutiny, the Court did outline governing principles. Lower courts have expanded the Supreme Court's *Croson* guidelines and applied or distinguished these principles when asked to decide the constitutionality of state, county, and city programs that seek to enhance opportunities for minorities and women.

[13] *Coral Construction Co.*, 941 F.2d at 916.
[14] *Coral Construction Co*., 941 F.2d at 916 (quoting *Croson*, 488 U.S. at 500-01).
[15] *Coral Construction Co.*, 941 F.2d at 916.

a. Evidence of significant statistical disparities between minorities utilized and qualified minorities available satisfies strict scrutiny and justifies a narrowly tailored M/WBE program.

(i) Determining Availability

Regarding statistical evidence to support a race-conscious program, the Supreme Court in *Croson* stated that "where gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination."[16] But the statistics may not compare the general population to prime construction contracts awarded to MBEs. The Court objected to this comparison "since the proper statistical evaluation would compare the percentage of MBEs in the relevant market that are qualified to undertake City subcontracting work with the percentage of total City construction dollars that are presently awarded to minority subcontractors."[17]

Under this formula, one of the most important elements is the "availability" determination—the number of qualified minority contractors willing and able to perform a particular service for the municipality. In *Croson*, the Court stated:

> Where there is a significant statistical disparity between the number of qualified minority contractors *willing and able* to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise.[18]

The Court further noted that "where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task."[19] An accurate determination of availability is necessary so that the legislative body may "determine the precise scope of the injury it seeks to remedy" by its program.[20] Following *Croson*'s statements on availability, lower courts have decided how legislative bodies may determine the precise scope of the

[16] *Croson*, 488 U.S. at 501.
[17] *Id*. at 470-71.
[18] *Croson*, 488 U.S. at 509 (emphasis added).
[19] *Croson*, 488 U.S. at 501-02.
[20] *Croson*, 488 U.S. at 498.

injury sought to be remedied by an MBE program. Where availability statistics are not accurately collected and carefully evaluated, they will be subject to attack. If the availability determination is too narrow, potential discrimination will be understated or dismissed. If the availability determination is too broad, discrimination will be exaggerated.

(ii) Racial Classifications

In determining availability, a threshold issue is the appropriate racial groups to consider. In *Croson*, the Supreme Court criticized the City of Richmond's inclusion of "Spanish-speaking, Oriental, Indian, Eskimo or Aleut persons" in the City's affirmative action program.[21] These groups had not previously participated in city contracting, and "[t]he random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination."[22] In order to properly evaluate availability, data must be gathered for separate racial groups.

(iii) Relevant Market Area

Another central issue in availability analysis is the definition of the relevant market area. Specifically, the question is whether the relevant market area should be defined as the area from which a specific percentage of purchases are made, the area in which a specific percentage of willing and able contractors are located, or a fixed geopolitical boundary. If the relevant market area is not properly defined, it can artificially inflate or deflate M/WBE availability. The Supreme Court has not yet established how the relevant market area should be defined. However, some courts of appeal have done so including the Tenth Circuit in *Concrete Works of Colorado, Inc. v. City and County of Denver.*[23] Concrete Works, a non-M/WBE construction company, argued that *Croson* precluded consideration of discrimination

[21] *Croson*, 488 U.S. at 506.
[22] *Id*.
[23] *Concrete Works of Colorado, Inc. v. City and County of Denver*, 36 F.3d 1513, 1520 (10th Cir. 1994).

evidence from the six county Denver Metropolitan Statistical Area (MSA) and, therefore, Denver should be confined to the use of data within the City and County of Denver alone. The Tenth Circuit, interpreting *Croson*, concluded, "The relevant area in which to measure discrimination . . . is the local construction market, but that is not necessarily confined by jurisdictional boundaries."[24] The court further stated:

> It is important that the pertinent data closely relate to the jurisdictional area of the municipality whose program we scrutinize, but here Denver's contracting activity, insofar as construction work is concerned, is closely related to the Denver MSA.[25]

The Tenth Circuit ruled that over 80 percent of Denver Department of Public Works construction and design contracts were awarded to firms located within the Denver MSA; therefore, the appropriate market area should be the Denver MSA—not the City and County of Denver alone.[26] Accordingly, data from the Denver MSA was "adequately particularized for strict scrutiny purposes."[27]

In light of this holding, the City of Phoenix should not be confined to counting only firms located within the City's boundaries. To confine the permissible data to the City's strict geographical boundaries would ignore the economic reality that contracts are often awarded to firms situated in adjacent areas.[28] It is, however, important that the pertinent data closely relate to the jurisdictional area. For example, in Phoenix, 92 percent of the City's construction dollars are spent with firms located in Maricopa County. Therefore, Maricopa County is the relevant market area.

Similarly, the City spends over 75 percent of its general services dollars in Maricopa County; Los Angeles County, California; Cook County, Illinois; and Rock Island, Illinois. Accordingly, these counties comprise the general services market area. Over 75 percent of

[24] *Id*.
[25] *Concrete Works*, 36 F.3d at 1520.
[26] *Id.*
[27] *Id.*
[28] See *Concrete Works*, 36 F.3d at 1520.

the City's dollars spent for commodities were spent in Maricopa County. Again, it would serve as the commodities market area. The same data extraction procedures used in Maricopa County were also used in Los Angeles County, Cook County, and Rock Island.

In *Concrete Works*, the court accepted data concerning only construction and construction related services in determining the relevant market area. It should be noted, however, that the court examined the construction industry in general and did not differentiate market areas for each construction service area. In considering the market area for the City of Phoenix, separate analyses for construction, general services, and commodities were conducted.

(iv) Firm Qualifications

Another availability consideration is whether the M/WBE firms considered are qualified to perform the required services. In *Croson*, the Court noted that although gross statistical disparities may demonstrate prima facie proof of discrimination, "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value."[29] The Court, however, does not define the appropriate mechanism for determining whether a firm is qualified.

Nevertheless, considering firm qualifications is important not only to assess whether M/WBEs in the relevant market area are capable of providing the goods and services required, but as the Supreme Court stated in *Hazelwood School District v. United States*, it also ensures proper comparison between the number of qualified M/WBEs and the total number of similarly qualified contractors in the relevant market area.[30] In short, proper comparisons are necessary to ensure the integrity of the statistical analysis.

[29] *Croson*, 488 U.S. 469, 501 (citing *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308 n.13 (1977)).
[30] *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977).

Proper comparisons in the statistical analysis in Phoenix were achieved by grouping firms by Standard Industrial Classification codes for each relevant minority and women classification in each county. The data was also disaggregated by the type of good or service provided. Finally, surveys and reviews of contracts were performed to verify the data base information used to make statistical comparisons. Not only ethnicity and gender information was verified, but also the type of service performed and contract award amounts, which confirmed the nature and volume of services that could be provided by M/WBEs. This verification served as an additional control to ensure that the pool of M/WBE candidates used to determine availability was in fact qualified.

(v) Willing

Croson requires that in order to be considered available a firm must be *willing* to provide the required services. As stated in *Croson*, an inference of discriminatory exclusion arises when there is significant statistical disparity between the number of qualified MBEs and WBEs actually engaged by the locality.[31] In this context, it can be a difficult task to determine whether a business is willing. Cases on this issue have authorized including businesses in the availability pool that may not be on a governmental entity's certification list. In *Concrete Works*, Denver presented evidence as part of its availability analysis indicating that while most MBEs and WBEs had never participated in city contracts, "almost all firms contacted indicated that they were interested in City work."[32]

In *Contractors Association of Eastern Pennsylvania*, *Inc*., the Third Circuit explained, "in the absence of some reason to believe otherwise, one can normally assume that participants in a market with the ability to undertake gainful work will be 'willing' to undertake it."[33]

[31] *Croson*, 488 U.S. at 509.
[32] *Concrete Works*, 36 F.3d at 1529.
[33] *Contractors Ass'n of Eastern Pennsylvania*, *Inc*. *v. City of Philadelphia*, 91 F.3d 586, 603 (3rd Cir. 1996).

> [P]ast discrimination in a marketplace may provide reason to believe the minorities who would otherwise be willing are discouraged from trying to secure the work. . . . [I]f there has been discrimination in City contracting, it is to be expected that African American firms may be discouraged from applying, and the low numbers [of African American firms seeking to prequalify for City-funded contracts] may tend to corroborate the existence of discrimination rather than belie it.[34]

In assessing the willingness of M/WBE firms in Phoenix, anecdotal evidence was adduced from M/WBEs certified with the City of Phoenix. All M/WBE firms contacted had either conducted business with the City, worked on City projects as subcontractors, or attempted to do business on a City project during the period of the study. In addition, each interviewee was asked, "Are you still interested in doing business with the City of Phoenix?" Overwhelmingly, the answer was yes. The firms contacted for interviews were randomly selected from approximately 1,000 firms. All of the persons who testified in the public hearings either did business with the City, worked on a City project or attempted to work on a City project. Finally, the firms interviewed were located within the relevant market areas for construction, general services, and commodities, and listed in the City's Minority, Woman, and Disadvantaged Business Directory, dated January 1, 1998.

(vi) Able

Another availability consideration is whether the firms considered are *able* to perform a particular service. Those who challenge affirmative action often question whether M/WBE firms have the "capacity" to perform particular services, which focuses the availability determination on firm size. *Concrete Works* recognized the shortcomings of such a focus.[35] Although the court observed that when a challenger introduces credible evidence of firm

[34] *Id*. at 603-04.
[35] *Concrete Works*, 36 F.3d at 1528-29.

capacity, "it becomes a factor that the court should consider."[36] The court also acknowledged the City of Denver's argument that "a construction firm's precise 'capacity' at a given moment in time belies quantification due to the industry's highly elastic nature."[37]

On the one hand, considering a firm's size may be necessary to determine whether the firm is capable and available to provide the requested services. On the other hand, some argue that firm size is not very significant in the availability analysis. It can also be argued that the relevance of firm size is somewhat diminished by the practice of hiring temporary employees. It is a common practice among construction companies of all sizes to routinely vary the size of their employment ranks depending on the type of project being undertaken. Even though the Tenth Circuit did not rule on the above issue, the court's acknowledgment of both sides of the argument justifies a position that limits the significance of firm size when determining whether a firm is to be considered available.

In Phoenix, in order to determine whether statistical disparities are better explained by race or gender discrimination as opposed to size, an examination of the subcontracting disparities would be more relevant in view of the fact that such contracts tend to be smaller, and the vast majority of MBEs and WBEs participate in City construction contracting through subcontracts. If underutilization is found to persist at such levels, it is probative of the conclusion that size is not the distinguishing feature.

(vii) The Use of Census Data to Measure Availability

Census data has the benefits of being accessible, comprehensive, and objective in measuring availability. In *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, the Eleventh Circuit Court approved the use of census data in the consultant's disparity study. The County presented the study as evidence of discrimination

[36] *Id*. at 1528.
[37] *Id*.

against African American-owned construction firms and analyzed the business receipts of these firms based on the Census Bureau's Survey of Minority-Owned Business Enterprises (SMOBE) and Survey of Woman-Owned Business Enterprises (SWOBE) from the years 1977, 1982, and 1987. The study found substantial disparities for African American-owned construction business receipts for 1977, 1987, but not 1982.[38]

In *Contractors Association of Eastern Pennsylvania, Inc.*, the Third Circuit Court of Appeals also approved the use of census data. The City's consultant calculated a disparity using data from the City concerning the total amount of contract dollars awarded by the City, the amount that went to MBEs, and the number of African American construction firms. The consultant combined this data with data from the Census Bureau on the number of construction firms in the Philadelphia Standard Metropolitan Statistical Area.[39]

These cases indicate that the use of census data has been permitted by the courts. But in studies using census data the statistical evidence presented included more data sources than just the census alone. Other options for measuring availability are surveys and certification lists. The use of census data is at least a sound beginning for an overview of availability, but other data sources should be used in addition to, or in conjunction with, census data in the final statistical analysis.

MGT's availability analysis for Phoenix not only included the Survey of Minority-Owned Business Enterprises, the Survey of Women-Owned Business Enterprises, and County Business Patterns, but also included a special data base from the Census Bureau that contained the number of firms by Standard Industrial Classification Codes for each relevant minority and women classification in each county in the United States. The Census Bureau also provided a tabulation of the total number of firms located in each county by industry division. This data was disaggregated by the type of good or service provided. Finally,

[38] *Engineering Contractors Ass'n of South Florida, Inc*., 122 F.3d at 923.
[39] *Contractors Ass'n of Eastern Pennsylvania, Inc.*, 91 F.3d at 604.

certification lists from the City of Phoenix were used to assist in identifying the availability of MBE and WBE firms.

(viii) Measuring Utilization/Evidence of Underutilization

To demonstrate an evidentiary basis for enacting a race- or gender-conscious program and to satisfy *Croson*'s compelling interest prong, governmental entities must present evidence of underutilization of MBEs and WBEs that would give rise to an inference of discrimination in public contracting.[40] To measure utilization, courts have accepted the standard disparity index. The Supreme Court in *Croson* recognized the use of statistical comparison to measure disparity by comparing the number of available M/WBEs qualified to perform certain contracts with the amount of City construction dollars that were actually being awarded to M/WBEs in order to demonstrate discrimination in the local construction industry.[41] In Phoenix, the disparity index was calculated by dividing the percentage participation in dollars of minority/women groups by their percentage availability or composition in the relevant market area and multiplying the results by 100.

The Ninth Circuit, in *Associated General Contractors of California, Inc. v. Coalition for Economic Equity*, approved the use of disparity indices in establishing discrimination. The court stated:

> Using the City and County of San Francisco as the "relevant market," the study compared the number of available MBE prime construction contractors in San Francisco with the amount of contract dollars awarded by the City to San Francisco-based MBEs for the 1987-88 fiscal year.[42]

The court concluded, "In our recent decision [*Coral Construction*] we emphasized that such statistical disparities are 'an invaluable tool' in demonstrating the discrimination necessary

[40] *Croson*, 488 U.S. at 509.
[41] *Croson*, 488 U.S. at 470-71.
[42] *Associated General Contractors of California, Inc. v. Coalition for Economic Equity*, 950 F.2d 1401, 1414 (9th Cir. 1991).

to establish a compelling interest."[43] Several U.S. courts of appeal have recognized the use of disparity indices or similar measures to examine the utilization of minorities or women in a particular industry.[44]

In *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, the Eleventh Circuit addressed what constitutes a significant level of disparity. Generally, disparity indices of 80 percent or greater—which are close to full participation—are not considered significant.[45] The court referenced the Equal Employment Opportunity Commission's disparate impact guidelines, which establish the 80 percent test as the threshold for determining a prima facie case of discrimination.[46] According to this court, no circuit that has explicitly endorsed using disparity indices has held that an index of 80 percent or greater is probative of discrimination.[47] But these courts have held that indices below 80 percent indicate "significant disparities."[48] Accordingly, in Phoenix, indices below 80 percent were considered determinative of significant disparity.

In support of the use of standard deviation analyses to test the statistical significance of disparity indices, the Third Circuit observed that "social scientists consider a finding of two standard deviations significant, meaning there is about one chance in 20 that the explanation for the deviation could be random and the deviation must be accounted for by some other factor than chance."[49] With standard deviation analyses, the reviewer can determine

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[43] *Associated General Contractors of California, Inc.*, 950 F.2d at 1414 (citing *Coral Construction Co*., 941 F.2d at 918; see also, *Croson*, 488 U.S. at 509).

[44] *Concrete Works of Colorado, Inc. v. City and County of Denver*, 36 F.3d 1513, 1523 n.10 (10th Cir. 1994) (recognizing disparity index to demonstrate underutilization); *Contractors Ass'n of Eastern Pennsylvania*, *Inc*. *v. City of Philadelphia*, 6 F.3d 990, 1005 (3rd Cir. 1993) (relying on disparity indices); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 915-16 (11th Cir. 1990) (employing similar statistical analyses).

[45] *Engineering Contractors Ass'n of South Florida, Inc*., 122 F.3d at 914.

[46] *Id.* at 914 (citing 29 C.F.R. § 1607.4D concerning the disparate impact guidelines and threshold used in employment cases).

[47] *Engineering Contractors Ass'n of South Florida, Inc*., 122 F.3d at 914 (referencing *Contractors Ass'n of Eastern Pennsylvania*, *Inc*., 6 F.3d at 1005, crediting disparity index of 4 percent; and *Concrete Works*, 36 F.3d at 1524, crediting disparity indices ranging from 0 percent to 3.8 percent).

[48] *Id*.

[49] *Engineering Contractors Ass'n of South Florida, Inc*., 122 F.3d at 914 (citing *Peightal v. Metropolitan Dade County*, 26 F.3d 1545, 1556 n.16 (11th Cir. 1994)).

whether the disparities are substantial or statistically significant, which lends further statistical support to a finding of discrimination.

b. Anecdotal evidence of the experiences of non-MBE, minority, and woman-owned firms may be used to justify an M/WBE program.

Most disparity studies utilize anecdotal evidence along with statistical data. The Supreme Court in *Croson* discussed the relevance of anecdotal evidence and explained: "Evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified."[50] While the Supreme Court in *Croson* did not expressly consider the form of or level of specificity required for anecdotal evidence, the Ninth Circuit has addressed both issues.

Regarding the appropriate *form* of anecdotal evidence, the Ninth Circuit in *Coral Construction* noted that the record provided by King County was "considerably more extensive than that compiled by the Richmond City Council in *Croson*."[51] The King County record contained affidavits of at least 57 minority or women contractors, each of whom complained in varying degrees of specificity about discrimination within the local construction industry. The *Coral Construction* court stated that the M/WBE affidavits "reflected a broad spectrum of the contracting community" and the affidavits "certainly suggested that ongoing discrimination may be occurring in much of the King County business community."[52] The affiants in King County, like the interviewees in Phoenix, reflected a broad spectrum of the contracting community. The breakdowns compare as follows:

[50] *Croson*, 488 U.S. at 509.
[51] *Coral Construction Co.*, 941 F.2d at 917.
[52] *Coral Construction Co*., 941 F.2d at 917-18.

Affiants – King County		Interviewees – Phoenix	
African American contractors	23	African American MBEs	16
Hispanic contractors	13	Hispanic MBEs	27
Asian contractors	10	Asian MBEs	8
Native American	6	Native American MBEs	3
Women contractors	3	WBEs	15
Other	2		
Total	57	Total	69

There is a striking similarity between the kind and quality of comments in King County's anecdotal record and the anecdotal record in Phoenix. The assertions of discrimination in the King County affidavits mirrored the types of comments recorded in the Phoenix interviews. In addition to the interviews in Phoenix, two public hearings were conducted during which 18 M/WBEs testified to similar instances of discrimination.

In *Associated General Contractors of California, Inc. v. Coalition for Economic Equity*, the Ninth Circuit addressed the *specificity* of anecdotal evidence required by *Croson*.[53] AGCC contended that the City's evidence lacked the specificity required by both *Croson* and *AGCC I*. The court held that the City's findings were based on substantially more evidence than the anecdotes in the two prior cases, and "they are clearly based upon dozens of specific instances of discrimination that are laid out with particularity in the record, as well as significant statistical disparities in the award of contracts."[54]

Reiterating the City's perspective, the court stated that the City "must simply demonstrate the existence of past discrimination with specificity; there is no requirement that the legislative findings specifically detail each and every instance that the legislative body had relied upon in support of its decision that affirmative action is necessary."[55]

Lower courts have relied on anecdotal data to demonstrate the existence of past and present discrimination. Both the Ninth and Eleventh Circuits have indicated that while anecdotal evidence alone is generally not sufficient to prove discrimination, the combination

[53] *Associated General Contractors of California, Inc.*, 950 F.2d at 1414 (9th Cir. 1991).
[54] *Id.* at 1416.
[55] *Id.*

of specific incidents of discrimination in conjunction with significant statistical disparities satisfies the "strong-basis-in-evidence" test for establishing discrimination to justify a narrowly tailored race- and gender-conscious program.

In *Coral Construction*, the Ninth Circuit addressed the use of anecdotal evidence *alone* to prove discrimination. While the court concluded that King County's anecdotal evidence was extensive, the court noted the absence in the record of any statistical data in support of the program. The Ninth Circuit recognized that the Supreme Court considers statistical analysis an essential means for evaluating race discrimination: "[W]here gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination."[56] The Ninth Circuit continued, "While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, if ever, can such evidence show a *systemic pattern of discrimination necessary for the adoption of an affirmative action plan*."[57] The court concluded that "the combination of convincing anecdotal and statistical evidence is potent."[58]

2. The Governmental Entity Enacting an MBE Program Must be Shown to Have Actively or Passively Perpetuated the Discrimination.

The Ninth Circuit held in *Coral Construction* that a municipality enacting a race-based program must have perpetuated the discrimination the program was designed to remedy.[59] However, the court stated, "*Croson* does not require a showing of *active* discrimination by the enacting agency; *passive* participation, such as the infusion of tax dollars into a discriminatory industry, suffices."[60] This holding follows from the Supreme Court's statement in *Croson*: "It is beyond dispute that any public entity, state or federal, has a *compelling*

[56] *Associated General Contractors of California, Inc.*, 950 F.2d at 1416 (citing *Croson,* 488 U.S. at 501).
[57] *Coral Construction Co.*, 941 F.2d at 919 (emphasis added).
[58] *Id.*
[59] *Id*. at 922.
[60] *Coral Construction Co.*, 941 F.2d at 922 (emphasis added).

interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of *private* prejudice."[61]

The Ninth Circuit in *Associated General Contractors of California, Inc. v. Coalition for Economic Equity* also recognized instances in which a governmental entity would be responsible for remedying private discrimination.

> [A] municipality has a compelling interest in redressing, not only discrimination committed by the municipality, itself, but also discrimination committed by private parties within the municipality's legislative jurisdiction, so long as the municipality in some way perpetuated the discrimination to be remedied by the program.[62]

Accordingly, municipalities such as Phoenix must be active or passive participants in the discrimination occurring within its jurisdictional boundaries to design and implement a race-based program. Assuming there is no creditable evidence of active discrimination by Phoenix, and it pays contract dollars to prime contractors who are in turn engaging in a pattern or practice of discrimination, then the City has a compelling interest in remedying such discrimination.

B. To Withstand Strict Scrutiny, an MBE Program Must be Narrowly Tailored to Remedy Identified Discrimination.

In *Coral Construction*, the Ninth Circuit ruled on the issue of whether King County's program was narrowly tailored. To be narrowly tailored, an MBE program should be instituted either after, *or in conjunction with*, race-neutral efforts to increase minority business participation in public contracting. Further, the use of minority participation goals must be set on a case-by-case basis, rather than as part of rigid numerical quotas. Finally, an MBE program must be limited in its effective scope to remedying discrimination within the boundaries of the enacting jurisdiction.[63]

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[61] *Coral Construction Co*., 941 F.2d at 922 (citing *Croson*, 488 U.S. at 492) (emphasis added).
[62] *Associated General Contractors of California*, *Inc.*, 950 F.2d at 1413 (citing *Croson*, 488 U.S. at 491-92).
[63] *Coral Construction Co.*, 914 F.2d at 922.

1. Race-Neutral Alternatives

Concerning race-neutral alternatives, the Supreme Court concluded that a governmental entity must demonstrate that it has evaluated the use of race-neutral means to increase minority business participation in contracting or purchasing activities.[64] In *Coral Construction*, the Ninth Circuit reasoned that "while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative."[65]

With regard to King County's comprehensive plan to increase minority participation, the Ninth Circuit concluded that "inclusion of such race-neutral measures is one factor suggesting that an MBE plan is narrowly tailored."[66] Thus, a governmental agency need not forestall instituting an affirmative action program if it is instituted either after, or in conjunction with, race-neutral measures. The court acknowledged that King County incorporated some race-neutral measures into its program (*e.g.*, training sessions for small businesses and information on accessing small business assistance programs) and for this reason had fulfilled the burden of considering race-neutral alternatives. Similar race-neutral measures have been implemented in Phoenix.

2. Flexibility

The court also concluded that King County passed the second aspect of the narrowly tailored test, which is flexibility. "Under the set-aside method, the prescribed percentage of MBE subcontractor participation is determined individually on each contract according to the availability of qualified MBEs."[67] Even though the program was locked into a five percent

[64] *Croson*, 488 U.S. at 507.
[65] *Coral Construction Co.*, 914 F.2d at 923.
[66] *Id.*
[67] *Id.* at 924.

preference allotted to MBEs, the court determined that under the circumstances "such a fixed preference is not unduly rigid."[68]

Another feature of program flexibility is a waiver provision. King County's program permitted prime contractors to request a waiver of the MBE participation requirement when a non-MBE was the sole source of a good or service, or if no MBE was otherwise available or competitively priced. In addition, under the preference method, if no MBE was within five percent of the lowest bidder, a non-MBE was awarded the contract. Therefore, the court concluded that "King County's MBE program is not facially unconstitutional for want of flexibility."[69] The goals setting program in Phoenix also incorporates a waiver provision. Further, if no M/WBE's bid is within 2.5 percent of the lowest bidder, a non-M/WBE is awarded the contract.

3. Geographic Scope

The third tailoring requirement is that the MBE program must be limited in its geographical scope to the boundaries of the enacting jurisdiction.[70] In *Coral Construction*, the Ninth Circuit concluded that the King County MBE program failed this aspect of the narrowly tailored requirement. Specifically, the definition of MBEs eligible to benefit from the program was over broad. It included MBEs that had no prior contact with King County if the MBE could demonstrate that discrimination occurred "in the particular geographic areas in which it operates."[71]

This MBE definition suggested that the program was designed to eradicate discrimination not only in King County, but also in the particular area in which a non-local MBE conducted business. In essence, King County's program focused on the eradication of *society-wide* discrimination, which is outside the power of the state or local entity. Since

[68] *Coral Construction Co.*, 941 F.2d at 924.
[69] *Id.* at 925.
[70] *Id.*
[71] *Coral Construction Co.*, 941 F.2d at 925.

"the County's interest is limited to the eradication of discrimination within King County, the only question that the County may ask is whether a business has been discriminated against in King County."[72]

In clarifying an important aspect of the narrowly tailored requirement, the court defined the issue of eligibility for MBE programs as one of participation, not location. For an MBE to reap the benefits of an affirmative action program, the business must have been discriminated against in the jurisdiction that established the program.[73] As a threshold matter, before a business can claim to have suffered discrimination, it must have attempted to do business with the County.[74] Significantly, "if the County successfully proves malignant discrimination within the King County business community, an MBE would be presumptively eligible for relief if it had previously sought to do business in the County."[75]

According to the court, the presumptive rule requires that the enacting governmental agency establish that systemic discrimination exists within its jurisdiction and that the MBE is, or attempted to become, an active participant in the agency's business community.[76] Since King County's definition of MBE permitted participation by those with no prior contact with King County, its program was over broad.

2.4 Conclusion

When developing and implementing a race- or gender-conscious program, it is crucial to understand the case law that has developed in the federal courts. These cases establish specific factors that must be addressed in order for such programs to withstand judicial review. Before instituting affirmative action programs, the governmental entity involved must engage in a specific fact-finding process to compile an evidentiary foundation. It is also

[72] *Id*.
[73] *Id*.
[74] *Coral Construction Co.*, 941 F.2d at 925.
[75] *Id*.
[76] *Id.*

important to understand the kinds of evidence that will be necessary and acceptable to provide a sufficient factual predicate for a race- or gender-conscious program. Ultimately, MBE and WBE programs can be successful and instrumental in remedying identified discrimination if enacting jurisdictions comply with the requirements outlined by the Supreme Court in *Croson* and the lower court cases that followed. The methodology used in this disparity study to determine whether there is significant statistical disparity between the availability and utilization of minorities and women in the City's contracting program incorporates the legal principles discussed herein.